

STEPHEN DWYER

IBLA 97-262

Decided November 8, 1999

Appeal from a decision of the California State Office, Bureau of Land Management, declaring lode mining claims forfeited and void. CAMC-243700 and CAMC-243704.

Affirmed.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A BLM decision declaring an unpatented mining claim situated within a unit of the National Park System forfeited and void by operation of law, pursuant to section 10104 of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28i (1994), will be affirmed where the claimant failed to either pay the maintenance fee, obtain NPS approval of the assessment work referenced in his small miner maintenance fee waiver certification, or file a petition for deferral of such work.

APPEARANCES: Stephen Dwyer, pro se; John R. Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Stephen Dwyer (Dwyer/appellant) has appealed from a February 6, 1997, decision of the California State Office, Bureau of Land Management (BLM), declaring the Little Storm Jade Mine and Storm Jade No. 4 lode mining claims, CAMC-243700 and CAMC 243704, forfeited and void by operation of law. BLM determined that while Dwyer timely filed a certification of waiver of payment of maintenance fees for the 1996 assessment year on or before August 31, 1995, as required by section 10101 of the Omnibus Budget Reconciliation Act of 1993 (Omnibus Budget Act), 30 U.S.C. § 28f (1994), and its implementing regulation, 43 C.F.R. § 3833.1-7(d), he did not qualify for a waiver because he had not filed a plan of operations with the National Park Service (NPS) on or before August 31, 1995.

In his Statement of Reasons (SOR), Dwyer asserts that the jurisdiction of NPS had not been finalized by Congress and complains that NPS

was attempting to take his valid existing rights. ^{1/} He contends that NPS claimed his permit was void and attempted to make him reapply for a new permit with them whereas he insists that he has the right to file assessment work and fees under BLM rules.

The subject claims were located by Dwyer in sec. 32, T. 3 S., R. 13 E., and sec. 4, T. 4 S., R. 13 E., San Bernardino Meridian, Riverside County, California, on March 1 and 30, 1991, and filed for recordation with BLM on April 29, 1991, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994). On October 31, 1994, Congress, pursuant to sections 402 and 403 of the California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4488, included the land encompassed by both claims within JTNP, and entrusted administrative jurisdiction over the park to NPS, U.S. Department of the Interior. This fact is reflected on BLM's Master Title Plats for the two townships. We thus do not accept Dwyer's assertion that NPS jurisdiction over that land has not been "finalized."

Under 30 U.S.C. § 28f(a) (1994), the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a claim maintenance fee of \$100 per claim on or before August 31 of each year for the years 1994 through 1998. Under 30 U.S.C. § 28i (1994), failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law." This provision is implemented by 43 C.F.R. § 3833.4(a)(2), which provides that failure to timely pay the claim maintenance fee or, in lieu thereof, file the waiver certification "shall be deemed conclusively to constitute a forfeiture of the mining claim, mill site, or tunnel site."

^{1/} Dwyer filed a request for stay with his SOR on Apr. 3, 1997. Thus, the request was not filed during the 30¹ day appeal period following his receipt of the February 1997 BLM decision on Feb. 18, 1997, and BLM's decision automatically became effective on Mar. 21, 1997, the first day after the expiration of the appeal period. 43 C.F.R. § 4.21(a)(2); Robert E. Oriskovich, 128 IBLA 69, 70 (1994). The effect was to render Dwyer's two mining claims forfeited and void, absent a stay. Therefore, regardless of the pendency of his appeal, he no longer has any obligation to maintain the claims in accordance with the Omnibus Budget Act. Cf. J.L. Block, 98 IBLA 209, 211¹ 12 (1987) (claimant not required to comply with filing requirement of section 314(a) of FLPMA during pendency of appeal from BLM decision declaring claim abandoned and void). To the extent that the Superintendent, Joshua Tree National Park (JTNP), provides otherwise in a Mar. 21, 1997, letter to Dwyer, a copy of which was provided by BLM to the Board on Apr. 11, 1997, that letter is in error. See id. at 2¹ 3. Because we here decide the appeal, the request for stay is denied as moot.

The statute and its implementing regulation also give the Secretary discretion to waive the fee for a small miner who certifies that, on the date the payment was due, the claimant held "not more than 10 mining claims, mill sites or tunnel sites, or any combination thereof, on public lands" and performed the assessment work required by the Mining Law of 1872. 30 U.S.C. § 28(f)(d) (1994); 43 C.F.R. § 3833.1-7(d). Thus, Dwyer was obligated to pay the required fees for the 1996 assessment year on or before August 31, 1995, unless he sought a waiver by filing an appropriate certification on or before August 31, 1995, and then qualified for the waiver. Alamo Ranch Co., 135 IBLA 61, 75-76 (1996).

The record shows that Dwyer did not pay the required fees nor does he assert that he paid any fees for the two claims. However, on August 24, 1995, Dwyer filed with BLM a "Maintenance Fee Payment Waiver Certification" listing CAMC-243700 and CAMC-243704, plus seven other claims not at issue in this appeal. This form certifies that Dwyer held or would hold 10 or fewer mining claims, mill sites or tunnel sites on Federal lands and had performed or would perform the assessment work required by the 1872 Mining Law for the 1995 assessment year. On December 29, 1995, Dwyer filed with BLM a copy of a document entitled "Assessment Work (California)," previously filed with the Riverside County Recorder on September 28, 1995. In it, he stated that \$200 worth of assessment work had been done on each of the two claims between November 1994 and September 1995 and noted the work done.

BLM, in its February 1997 decision, declared his claims forfeited and void by operation of law, pursuant to section 10104 of the Omnibus Budget Act, because he had failed to "qualify" for a waiver of payment of maintenance fees for the 1996 assessment year. (Decision at 2.) BLM explained that Dwyer did not qualify for a waiver because he failed to submit a complete plan of operations to the officials at JTNP for approval in conformance with 36 C.F.R. §§ 9.7(b) and 9.9 prior to August 31, 1995. The decision also stated that there was no record that Dwyer had filed for a deferment of assessment work or paid the maintenance fees.

In order to properly undertake any operations on lands within a unit of the National Park System, including assessment work required by the Mining Law of 1872, a claimant must first submit a complete plan of operations and obtain NPS' approval in accordance with 36 C.F.R. § 9.7(a). 2/ The NPS

2/ Regulation 36 C.F.R. § 9.7(a), provides that, in the case of a claim within a unit of the National Park System, an access permit and an "approved plan of operations must be obtained by a claimant prior to the performance of any assessment work required by Revised Statute 2324 (30 U.S.C. 28)." In addition, NPS interprets the statement in 36 C.F.R. § 9.7(b) that no access permit will be issued solely for assessment work, in the absence of a showing that such work is necessary for patent purposes, to mean that, absent such a showing, it will only approve a plan to conduct such work in conjunction with "bona fide mining activities." (Letter to "Claimant" from Chief, Geologic Resources Division, NPS, dated

regulations generally provide that "[n]o operations" shall be conducted absent submission and approval of a plan of operations, 36 C.F.R. § 9.9(a). The regulations also identify the requirements for a proper plan (36 C.F.R. § 9.9(b) and (c)) and for NPS approval (36 C.F.R. § 9.10).

In some cases, a claimant may fail to obtain NPS' approval in sufficient time for him to undertake the required assessment work prior to August 31 and thus not be able to timely certify to BLM the performance of such work in accordance with section 10101(d) of the Omnibus Budget Act and 43 C.F.R. § 3833.1-7(d). In this situation, the claimant may, as recognized by NPS, file, on or before August 31, a petition for the deferment of assessment work. See Letter to Dwyer from Superintendent, JTNP, dated Mar. 21, 1997, at 2-3 (summarizing NPS' notice at 61 Fed. Reg. 1600, 1602 (Jan. 22, 1996)). Regulation 43 C.F.R. § 3833.1-6(e) specifically provides that, if the petition is filed on or before August 31, "the maintenance fee need not be paid on the claims listed in the petition * * * until [BLM] has acted upon the petition." If the petition is granted, payment of the fee is "deferred for the upcoming assessment year." 43 C.F.R. § 3833.1-6(e)(1). However, even if the petition is denied, the claimant is afforded 30 days from receipt of the decision of denial to pay the maintenance fees. 43 C.F.R. § 3833.1-6(e)(2). No petition for deferment was filed in this case, and the provisions related thereto are thus not relevant to our consideration.

In its decision, BLM sets forth what is necessary for the owner of a claim within a unit of the National Park System to avoid paying a maintenance fee. Moreover, it explains the requirement in terms of what a claimant needs to do to "qualify for the Maintenance Fee Waiver." (Decision at 2.) The sole question for decision here is whether Dwyer's timely¹ filed waiver certification, attesting to the performance of assessment work, satisfied section 10101(d) of the Omnibus Budget Act and 43 C.F.R. § 3833.1-7(d), where the work was performed without NPS' approval of a plan of operations. We hold that it does not.

[1] The regulations at 36 C.F.R. §§ 9.7 and 9.9 provide that the NPS will not allow any mining-related activities, including activities

fn. 2 (continued)

July 7, 1995, at 2; Letter to Dwyer from Superintendent, JTNP, dated Jan. 15, 1997, at 2.) NPS has elsewhere explained: "To reduce unnecessary surface disturbance in park units, § 9.7(b)(2) of the NPS regulations precludes the NPS from * * * approving plans of operations for activities in park units that are conducted solely for the purpose of fulfilling BLM's requirement of \$100 of annual assessment work." 61 Fed. Reg. 1601 (Jan. 22, 1996).

To the extent that Dwyer objects to the requirement in 36 C.F.R. § 9.7(a) that he obtain NPS approval of a plan of operations in order to undertake any assessment work, we note only that we lack any authority to invalidate duly promulgated regulations of the Department. Alamo Ranch Co., Inc., 135 IBLA at 69; Steve D. Mayberry, 82 IBLA 339, 343 (1984).

that fulfill the assessment work requirement, to be conducted within the boundaries of a national park, unless the miner, including a small miner, has first obtained an approved plan of operations and posted a reclamation bond with NPS. The 1977 regulations concerning mining in national parks in 36 C.F.R. Part 9A derive from Congressional direction contained in the Mining in the Parks Act of 1976. 16 U.S.C. §§ 1901-1908 (1994). In U.S. v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989), the court upheld the NPS regulations which require that a miner obtain approval of a plan of operations prior to beginning mining-related activities.

After the miner obtains NPS approval of his plan of operations, he or she may conduct operations on a mining claim that will satisfy the assessment work requirement. Although appellant contends that plans of operations are only required for actual mining operations (SOR at 8), 36 C.F.R. § 9.2 broadly defines "operations" to encompass nearly all mining-related activities. In fact, the NPS regulations specifically state that "[a]n access permit and approved plan of operations must be obtained by a claimant prior to the performance of any assessment work required by Revised Statute 2324 (30 U.S.C. 28) on a claim in a unit." 36 C.F.R. § 9.7. The regulations at § 9.7 further state that "the Secretary will not challenge the validity of any unpatented mining claim for the failure to do assessment work during or after the assessment year commencing September 1, 1976." Id. We find that the decision appealed from does not violate this regulation because it does not invalidate the claims for failure to perform assessment work, but rather, it properly invalidates the claims for failure to pay the maintenance fee, which was due because appellant failed to qualify for a small miner exemption.

In conclusion, appellant timely filed the maintenance fee waiver for the 1996 assessment year, but the filing relied upon assessment work between September 1, 1994, and September 1, 1995. That assessment work was unauthorized because there had been no NPS prior approval of his plan of operations and thus no valid assessment work was performed in that assessment year. Mere compliance with the filing requirement does not constitute compliance with the statutory requirement for small miners to perform valid assessment work in 1 year in order to qualify for a waiver of maintenance fees for the next assessment year. Because appellant failed to take the steps necessary to qualify for a small miner's waiver, he was required to pay the maintenance fee by August 31, 1995. The Board has held on numerous occasions that the failure to pay the maintenance fees or qualify for a small miner waiver compels the invalidation of the subject claims. See Richard C. Swainbank, 141 IBLA 37, 46 (1997); Michael Nemeth, 138 IBLA 238, 241 (1997); Lester W. Pullen, 131 IBLA 271, 273 (1994).

To the extent appellant has raised other claims not specifically addressed herein, they have been carefully reviewed and found to be without merit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed, and Dwyer's petition for a stay of the effect of that decision is denied.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

